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Does Oregon's Appellate Court System Need Fixing?

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For nearly 150 years, the Oregon appellate court system has served the public with a high degree of ingenuity and innovation. Oregon's appellate judges are consistently regarded as among the best and brightest in the nation. But as Oregon's population continues to increase, combining with a more litigious citizenry and tighter state budgets, the efficient administration of justice in the appellate courts grows more elusive by the day. At present, civil litigants in Oregon's appellate courts must often wait up to four years and spend thousands of dollars to receive a final disposition.

At the time of statehood in 1859, the primary function of the Oregon Supreme Court, as the state's only appellate court, was to review decisions of the trial courts. Today, appellate court jurisdiction in Oregon extends far beyond the simple review of lower court decisions. Examples of these additional responsibilities include review of ballot titles, certain agency determinations, legislative apportionment, and attorney discipline proceedings. Despite the additional burdens placed on the system, the appellate court structure has remained largely unchanged for over thirty years. For Oregon's appellate courts to operate effectively in the twenty-first century, some changes to the current system are certainly in order.

The purpose of this Essay is to urge the Oregon legislature to undertake an in-depth review of Oregon's appellate court system, with an aim toward increasing judicial efficiency and reducing *478 delays and costs. The Essay first traces the history of Oregon's appellate courts, including such milestones as the establishment of the Oregon Supreme Court in 1857, the 1910 initiative that provided the foundation for Oregon's current judicial system, and the creation of the Oregon Court of Appeals in 1969. It then summarizes the current jurisdiction of both the court of appeals and the supreme court, and provides recent judicial statistics detailing the volume and types of cases filed in both courts. Next, the Essay identifies increasing delays and costs as the primary threats to justice in Oregon's appellate courts, and analyzes four notable cases that illustrate some of the problems found in the current system. Finally, it concludes by offering various reform proposals designed to reduce the significant delays and costs presently experienced by many appellant litigants in Oregon.

I

Oregon's Judicial Branch: Beginnings and Evolution

A. The Constitutional Convention of 1857

Oregon's constitutional convention opened on August 17, 1857, at the Marion County Courthouse in Salem. [\[FN1\]](#) The delegates elected Matthew P. Deady, a member of the Oregon Territorial Supreme

Court and delegate from Douglas County, to serve as the convention's president. [FN2] Organizational matters dominated the convention's early sessions. [FN3] The structure of the judicial branch was the first major issue considered by the delegates, and debate over the proposed judicial article lasted for nearly an entire week. [FN4] The debate centered largely on arcane issues, including the jurisdiction of the various courts, structure *479 of grand juries, and terms and number of supreme court judges. [FN5] Despite the relatively unremarkable contents of the proposed judicial article, significant anti-judicial sentiment existed among the delegates. For example, Multnomah County delegate David Logan called the proposed article "a bill of abominations, a running sore designed to suck out the substance of the people." [FN6] Thomas Dryer, a delegate from Multnomah and Washington Counties, claimed that the article created a "judicial monarchy" and vigorously argued that the determination of factual and legal issues should rest with juries, not judges. [FN7]

The judicial article ultimately adopted by the convention, which appeared as article VII of the Oregon Constitution of 1857, was largely unremarkable. It created a state supreme court consisting of four justices chosen from separate districts. [FN8] The article also permitted the legislature to increase the number of supreme court justices, but mandated that the number of justices "shall not exceed five until the white population of the State shall amount to One Hundred Thousand, and shall never exceed seven." [FN9] All judges chosen under the new constitution would serve six-year terms and be eligible for reelection. [FN10] The supreme court's jurisdiction was limited to revising decisions of the circuit courts. [FN11] Supreme court justices also acted as trial judges in the circuit court, but could not hear appeals in cases where they served as the trial judge. [FN12] The original article VII gave the legislature the power, once Oregon's "white population" reached 200,000, to provide for the separate election of supreme court and circuit court judges. [FN13] Three of those judges would serve exclusively as supreme court justices. [FN14] Judges could be removed for cause by a two-thirds vote of each house of the legislature. [FN15] With little fanfare, Oregonians approved the new constitution in a special election held November 9, 1857, by a vote of 7,195 *480 to 3,215. [FN16]

B. Current Structure of the Oregon Judicial Department

1. The 1910 Initiative

The original judicial department article approved in 1857 was almost completely revised by a voter initiative in 1910. In many ways, the 1910 initiative laid the groundwork for Oregon's current judicial system. The current version of article VII provides that "[t]he judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law." [FN17] Article VII thus gives the legislature the power to create courts inferior to the supreme court. Supreme court justices are now elected in statewide elections for six-year terms, and the legislature is prohibited from lowering the compensation of sitting judges. [FN18]

In addition to revamping the structure of Oregon's judiciary, the 1910 initiative substantially revised the supreme court's jurisdiction. The supreme court retained jurisdiction over appeals from the circuit courts, and gained original jurisdiction in mandamus, quo warranto, and habeas corpus proceedings. [FN19] Supreme court justices were required to affirm the decisions of lower courts, despite the presence of error, when the error was harmless. [FN20]

The amended version of article VII approved in 1910 repealed original article VII only to the extent that the two articles conflicted with each other. [\[FN21\]](#) Section 2 of amended article VII provided that original article VII “shall remain as at present constituted until otherwise provided by law.” [\[FN22\]](#) Thus, amended article VII effectively classified original article VII as a statute, subject to change by legislative enactments. For example, since amended article VII does not address the number of supreme *481 court justices, the legislature could increase the number beyond the seven provided for in original article VII. [\[FN23\]](#)

2. Legislative Modification of the Supreme Court’s Jurisdiction

Because the supreme court’s jurisdiction is set out in original article VII, not amended article VII, the legislature has the power to alter the court’s jurisdiction (except that section 2 of amended article VII prohibits the legislature from depriving the supreme court of original jurisdiction over mandamus, quo warranto, and habeas corpus proceedings). [\[FN24\]](#) Not surprisingly, the legislature has changed the jurisdiction of the supreme court considerably since 1910. The supreme court’s primary function today is the discretionary review of decisions of the Oregon Court of Appeals. [\[FN25\]](#)

In addition to review of lower court decisions, the legislature has also seen fit to give the supreme court jurisdiction over a wide range of other matters. The supreme court currently has original jurisdiction not only in the matters specified in amended article VII, but also in ballot title review, [\[FN26\]](#) challenges to financial impact statements accompanying ballot measures, [\[FN27\]](#) challenges to ballot measure explanatory statements, [\[FN28\]](#) reapportionment of congressional and legislative districts, [\[FN29\]](#) determinations of judicial fitness, [\[FN30\]](#) and attorney discipline cases. [\[FN31\]](#) In addition, the supreme court has direct review (bypassing the court of appeals) in death penalty cases, [\[FN32\]](#) appeals from decisions of the Oregon Tax Court, [\[FN33\]](#) decisions of the Energy Facility Siting Council, [\[FN34\]](#) challenges to proposed prison sites, [\[FN35\]](#) certain constitutional challenges *482 to state ballot measures, [\[FN36\]](#) and certified questions from other state and federal courts. [\[FN37\]](#) The supreme court is also responsible for determining whether attorneys are qualified for admission or reinstatement to the Oregon State Bar. [\[FN38\]](#)

3. Establishment of the Oregon Court of Appeals

As Oregon’s population grew during the first half of the twentieth century, the workload of the Oregon Supreme Court increased in kind. In an effort to expedite appellate decision-making, the supreme court sometimes heard cases in “departments” of three justices. During the 1950s, however, civil litigants routinely encountered delays of two to three years between the date of judgment in the trial court and final disposition by the supreme court. [\[FN39\]](#) These delays led the Oregon State Bar, in a 1956 resolution, to declare that “the problem of delay on appeals to the Oregon Supreme Court is one of the most serious problems confronting the administration of justice in Oregon at the present time.” [\[FN40\]](#) Around this time, the idea of an intermediate appellate court began to surface, but early proposals for such a court found little support. [\[FN41\]](#) In 1957, the Legislative Interim Committee on Judicial Administration specifically recommended against creating an intermediate court, citing higher costs, increased delay, and jurisdictional difficulties. [\[FN42\]](#) The committee instead urged an increase in the number of supreme court justices to nine, encouraged the supreme court to decide more cases in three-judge departments, and suggested that the supreme court appoint circuit judges and retired supreme court judges to sit temporarily in the supreme court. [\[FN43\]](#)

By the mid-1960s, despite following the Committee's recommendations regarding the increased use of temporary judges and three-judge departments, the supreme court saw its workload reach overwhelming proportions. Around this time, legislative proposals for an intermediate appellate court gained momentum. *483 During the 1969 session, the legislature for the first time actively considered a proposal for an intermediate appellate court. The bill, H.B. 1195, proposed a five-member intermediate appellate court with jurisdiction over criminal, probate, and domestic relations cases, as well as appeals from decisions of administrative agencies. [FN44] The bill also provided for discretionary review of the intermediate court's decisions by the supreme court. [FN45] The legislature heard testimony in support of H.B. 1195 from Chief Justice William C. Perry, Justice Ralph M. Holman, Governor Tom McCall's legal counsel, and future supreme court justices Hans Linde and Jacob Tanzer, among others. [FN46] According to these witnesses, the increased workload of the supreme court resulted from the United States Supreme Court's holding that a criminal defendant has a constitutional right to at least one appeal. [FN47] Senator Berkeley Lent, who later served as chief justice of the Oregon Supreme Court from 1982 to 1983, and other legislators opposed H.B. 1195, arguing that it would lead to increased costs and inefficiency. [FN48] Ultimately, the legislature passed, and Governor McCall signed, H.B. 1195 essentially as introduced, creating what is today the Oregon Court of Appeals. [FN49]

4. Increases in the Size and Workload of the Court of Appeals

Within a short time, legislators enhanced both the size and jurisdiction of the court of appeals. The 1973 legislature increased the number of judges on the court from five to six. [FN50] Two significant changes to the court of appeals occurred in 1977. First, the size of the court was increased to its current number of ten judges. [FN51] Second, the legislature gave the court of appeals exclusive jurisdiction over all appeals, except in cases where the Oregon Constitution or statutory law confers original jurisdiction on *484 the supreme court. [FN52] Once the court of appeals issues a decision, an aggrieved party may petition the supreme court for review. [FN53] Legislation enacted in 1981 also authorizes the court of appeals to certify appeals to the supreme court, and the supreme court may accept or reject such appeals. [FN54]

5. Summary

In sum, Oregon's present appellate court structure, which provides for the discretionary review of intermediate court decisions by the supreme court, in many ways mirrors our federal court system. The Oregon Court of Appeals, as the state's intermediate appellate court, has exclusive jurisdiction over most appeals with a few notable exceptions. The most prominent of these exceptions include appeals from death sentences, review of decisions of the Oregon Tax Court, and mandamus proceedings. These matters bypass the court of appeals and proceed directly to the Oregon Supreme Court for review. A litigant aggrieved by a court of appeals decision may petition for review in the supreme court, but the supreme court has discretion to accept or deny the petition. The supreme court also has the statutory duty to review a host of other matters, the most prominent being challenges to initiative ballot titles, death sentences, and attorney discipline proceedings.

II

The Current State of Affairs

A. Court of Appeals

Although the judicial statistics currently available are somewhat inconsistent and contradictory, they do provide a basic window into the current state of Oregon's appellate court system. [\[FN55\]](#) At present, approximately 4,000 cases are filed each year in the court of appeals, and the court annually closes about the same number of cases.

***485** Cases Filed in the Oregon Court of Appeals, 1997-2001

Year	Cases Filed
1997	4,653
1998	4,359
1999	4,029
2000	3,989
2001	4,177

Criminal appeals, habeas corpus, parole review, and post-conviction cases usually account for slightly more than half of the total cases closed each year. Review of agency determinations make up another ten to fifteen percent of the court's cases, about half of which are appeals from the decisions of the Workers' Compensation Board. The remainder of the court's caseload consists primarily of ordinary civil, domestic relations, juvenile, and termination-of- parental-rights cases. The court of appeals may certify cases directly to the supreme court, but certification by the court of appeals and acceptance of the certification by the supreme court is rare. The supreme court has not issued a written opinion in a case certified to it by the court of appeals since October 1998. [\[FN56\]](#)

B. Supreme Court

The supreme court annually receives around 800 petitions for review of court of appeals decisions, and in a typical year grants review in between five and ten percent of those cases.

Petitions for Review in the Oregon Supreme Court, 1997-2001

Year	Petitions Filed	Petitions Allowed
1997	796	70
1998	958	59
1999	862	58
2000	767	83
2001	719	59

***486** In addition to its discretionary review function, the supreme court receives another 250 cases or so on direct review. Approximately one-third of these cases are applications for writs of mandamus that the court decides without published opinion. Each year, the supreme court authors approximately 100 published opinions. The number of ballot titles reviewed by the supreme court continues to increase, and ballot titles now annually account for somewhere between twenty-five and thirty-five percent of the supreme court's total number of written opinions. The supreme court typically decides less than five death penalty cases each year, although these opinions are usually lengthy and involve numerous issues. Attorney discipline proceedings annually account for another ten to fifteen written opinions. The supreme court also writes opinions in approximately ten cases appealed from the tax court each year. Thus, in recent years, discretionary review cases make up on average around half of the supreme court's total number of written opinions.

III

Troubleshooting Oregon's Appellate Court System: The Problems of Delay and Cost

The current state and effectiveness of Oregon's appellate court system was the focus of an April 2001 seminar sponsored by the Oregon Law Institute. At the seminar, judges and practicing attorneys alike expressed concern over various characteristics of Oregon's appellate system. In preparation for this Essay, we solicited responses to a set of questions regarding Oregon's appellate courts from approximately twenty members of the Oregon State Bar. The questions are set forth in Appendix 1. A variety of attorneys, including retired supreme court, court of appeals, and circuit court judges, provided responses, as did a number of distinguished lawyers with experience litigating in Oregon's appellate courts. Their responses were widely varied. Many respondents identified problems in Oregon's present appellate court system and offered suggestions for improvement.

A. Concerns of Judges and Lawyers

The one area of concern common to nearly all seminar participants and survey respondents was the increasing amount of delay and high costs presently experienced by litigants in Oregon's appellate ***487** courts. A strong general sentiment appears to exist among the bench and bar in favor of lessening both the time and costs associated with appellate litigation. In 1956, the Oregon State Bar viewed the two- to three-year delays common in the system at that time as a serious threat to justice. [\[FN57\]](#) Forty-six years later, the time currently required for a case to fully wind its way through Oregon's appellate court system has increased substantially. Litigants in civil cases today must often spend four years or more in Oregon's appellate courts before they receive a final judgment. [\[FN58\]](#) The cost of litigation under Oregon's two-step appellate system also continues to rise. A recent advertisement in the Oregon State Bar Bulletin offered to prepare a petition for review in the supreme court for \$2,500, exclusive of costs. [\[FN59\]](#) However, according to experienced appellate attorneys at two Portland, Oregon, law firms, Miller Nash and Stoel Rives, the total cost of petitioning for supreme court review in an average commercial dispute is significantly higher. They estimate that the attorney fees associated with preparing a petition for review in such cases amount to at least \$10,000, and litigants can plan to spend an additional \$10,000 or more if the supreme court grants the petition. [\[FN60\]](#) These amounts are in addition to the costs associated with briefing and arguing the case in the court of appeals.

B. Some Recent Cases

Several recent, notable decisions from Oregon's appellate courts provide real-life illustrations of these concerns. Of course, some may urge that these cases be classified as atypical. Nevertheless, they raise some very important questions about the effectiveness of Oregon's current appellate court system.

1. McCathern v. Toyota Motor Corp.

In *McCathern v. Toyota Motor Corp.*, [\[FN61\]](#) Linda McCathern sustained serious physical injuries in an accident involving a Toyota automobile. The accident left McCathern a quadriplegic, and she ^{*488} filed suit against Toyota alleging that the vehicle's design was defective. In 1997, a jury awarded McCathern \$7.6 million in damages. Toyota appealed the jury's verdict, and the court of appeals affirmed the jury's award in March 1999. Toyota then petitioned the supreme court to review the decision of the court of appeals. The supreme court agreed to review the case, heard oral argument, and in May 2001, nearly four years after the jury's verdict and six years after McCathern's catastrophic accident, affirmed the decision of the court of appeals. According to lawyers familiar with the case, the supreme court's decision clarified confusion regarding the standard of review for punitive damage awards. [\[FN62\]](#) Had the court of appeals certified this case of statewide significance directly to the supreme court under ORS 19.405, McCathern would have received compensation for her injuries at least two years earlier. In addition, the decision to forgo certification of the case to the supreme court forced Oregonians to wait an additional two years for clarification of the appropriate standards for assessing the validity of punitive damage awards.

2. Doe v. State

Another instance of the detrimental effects of delay on litigants in our current appellate system is the case of *Doe v. State*, [\[FN63\]](#) the legal challenge to Measure 58, Oregon's landmark adoption rights law passed by voters in November 1998. Measure 58 gave adult adoptees born in Oregon, for the first time, the right to see their original birth certificates. [\[FN64\]](#) It clearly was controversial, highly publicized, supported and opposed by numerous organizations both within and outside the state, and undoubtedly headed for a groundbreaking, statewide decision by Oregon's highest court. In August 1999, the trial court rejected the claims of six anonymous birth mothers that the law violated their constitutional rights of contract and privacy. The mothers appealed, and instead of certifying the case to the supreme court for a decision, the court of appeals heard oral arguments and issued a written opinion affirming the trial court in December 1999. But this decision was not the end of the case. The court of appeals then ^{*489} issued a seven-day stay preventing the law from taking effect while the mothers petitioned for review by the supreme court. The supreme court extended the stay indefinitely while it considered the petition, and ultimately denied the mothers' petition for review on March 21, 2000. Nearly two months later, on May 16, 2000, the supreme court declined to reconsider its decision, but permitted the stay to remain in place while the mothers sought relief in the United States Supreme Court. The Supreme Court subsequently denied the mothers' claims, and Measure 58 finally took effect in June 2000. For eighteen months after Oregon voters approved Measure 58, over 2,000 adoptees seeking relief under the law were denied access to their birth records. Clearly, if this bellwether legal proceeding had bypassed the court of appeals and gone directly to the Oregon Supreme Court, those 2,000 adoptees would have known their birth parents' names months earlier and been spared the substantial emotional costs arising from

the delay. The litigants would have also avoided the additional time and cost associated with preparing a petition for review in the supreme court.

3. Lakin v. Senco Products, Inc.

The problems of increased delay and high costs are further illustrated by *Lakin v. Senco Products, Inc.*, [\[FN65\]](#) the case that invalidated Oregon's statutory cap on noneconomic damages. In 1987, the Oregon legislature imposed a \$500,000 cap on noneconomic damage awards. [\[FN66\]](#) John Lakin was working with a nail gun in December 1990 when the gun misfired, sending a nail into his brain. The accident left Lakin with severe brain damage and partial paralysis. A jury in February 1994 awarded Lakin \$9.3 million in damages, including \$2 million in noneconomic damages for pain and suffering. The jury also awarded Lakin's wife \$876,000 in noneconomic damages for loss of consortium. In accordance with the statutory cap, the trial judge reduced the noneconomic damage awards to \$500,000 each. The court of appeals held the cap unconstitutional and reinstated the jury's awards in October 1996, and the manufacturer of the nail gun subsequently sought review in the supreme court. Almost three ***490** years later, and more than five years after the jury's verdict, the supreme court affirmed the decision of the court of appeals on different grounds. Given the statewide import of the pain-and-suffering damages cap, few doubted that the supreme court would ultimately decide the case. Certification of this case directly to the supreme court would have provided Lakin much-needed compensation in a more timely fashion and expedited a final ruling on an issue of statewide constitutional significance.

4. Smothers v. Gresham Transfer, Inc.

Smothers v. Gresham Transfer, Inc., [\[FN67\]](#) a recent case concerning the constitutionality of Oregon's workers' compensation scheme, provides a final example of the time-consuming and costly nature of our present appellate system. Terry Smothers, a lube technician for a Gresham trucking company, contracted a respiratory infection in 1993 that developed into pneumonia. Smothers quit his job and filed a workers' compensation claim in 1994, which his former employer's insurer denied. The Workers' Compensation Board upheld the denial, and the court of appeals affirmed the decision without opinion. Smothers then filed a negligence action against his former employer in May 1995. The trial court dismissed Smothers' claim on grounds that the workers' compensation statutory scheme was his sole remedy, and the court of appeals affirmed the trial court's judgment in July 1997. The supreme court agreed to review the case in November 1998. Two and one-half years later, in May 2001, the supreme court reversed the decision of the court of appeals and held that denying a worker the right to sue for on-the-job injuries violated the Oregon Constitution. As a constitutional challenge to Oregon's long-standing workers' compensation system, the case had the potential to, and ultimately did, affect thousands of Oregon workers and businesses. Further, the significant and far-reaching constitutional issues raised in the case were clearly worthy of expedited consideration by the Oregon Supreme Court. However, nearly six years elapsed between the trial court's dismissal and the supreme court's final disposition in Smothers' case.

Possible Solutions to the Problems of Delay and Cost

Members of the bench and bar have proposed a variety of solutions to the lengthy delays and high costs presently experienced by litigants in Oregon's appellate courts. This Part summarizes and considers the merits of various reform proposals.

A. Ballot Measures and the Oregon Supreme Court

One oft-mentioned reform proposal is the elimination or substantial revision of the supreme court's role in Oregon's initiative process. At present, the supreme court directly reviews challenges to proposed ballot titles, financial impact statements, and explanatory statements before they appear on the ballot. Of these cases, review of proposed ballot titles places the largest burden on the court. According to Chief Justice Wallace P. Carson, Jr., ballot title review cases are "'a matter of increasing concern to [the supreme court] These cases have forced us to put our other work aside.'" [\[FN68\]](#) Professor Garrett Epps of the University of Oregon School of Law assesses the situation more bluntly, characterizing the supreme court's role in ballot title review as "'a gigantic waste of effort.'" [\[FN69\]](#)

Indeed, supreme court review of ballot titles, explanatory statements, and financial impact statements seems to be an inappropriate task for the judicial branch of government. Particularly in ballot title review cases, the court is often forced to render decisions akin to advisory opinions on matters that are likely to come before it in the future, as opposed to adjudicating real legal disputes between parties. Furthermore, initiative-related cases unquestionably place a very significant burden on the supreme court's workload, accounting for approximately one-quarter to one-third of the supreme court's annual written opinions. [\[FN70\]](#) The impact of these cases on the supreme court docket is even greater in election years. In one three-month period, from April through June of 2000, challenges to proposed ballot titles constituted twenty-six of the court's thirty-one rulings. [\[FN71\]](#) The court consumes *492 valuable time hearing oral arguments in initiative-related cases and typically must decide them in an expedited fashion, which in turn increases the time required for deciding issues of statewide and constitutional significance.

The obvious solution to the supreme court's initiative dilemma is to completely remove review of ballot titles and other initiative-related matters from the judicial branch. One proposal would give the responsibility for writing ballot titles to a neutral citizens panel. Other possibilities involve altering the current process while keeping review of initiative-related cases in the judicial branch. For instance, the legislature could preclude judicial review of ballot titles until proponents gather the signatures required to place the initiative on the ballot. Another option is the enactment of legislation establishing a special panel to decide initiative-related suits, perhaps consisting of retired supreme court justices or other judges. Still another possibility involves supreme court arbitration of ballot title disputes, where the court would select a ballot title from those submitted by the attorney general and initiative supporters and opponents. Less drastic proposals include requiring the supreme court to decide ballot title challenges on the briefs unless the chief petitioner of the measure requests oral argument, and using three-judge panels to hear all initiative-related suits. [\[FN72\]](#)

Delays in Oregon's appellate system will only increase as long as the supreme court plays a direct role in initiative-related cases. Using one of the above proposals, the legislature should remove direct review of ballot titles and other initiative-related cases from the supreme court's workload. Such action would reduce the supreme court's number of written opinions by at least twenty-five percent and permit the court to focus more attention on important statewide legal questions. Deciding these types of issues, not issuing advisory opinions on proposed ballot titles, should be the primary role of Oregon's highest court.

B. Bypassing the Court of Appeals

1. Certification Under ORS 19.405

Under ORS 19.405, the court of appeals may certify cases directly to the supreme court for disposition. A majority vote of ***493** the judges of the court of appeals is required to certify an appeal to the supreme court. [\[FN73\]](#) Likewise, a majority of the supreme court justices considering the case must vote to accept a certification. [\[FN74\]](#) This procedure appears to provide an effective means to expedite decisions in cases where ultimate review by the supreme court is likely. Moreover, since the supreme court may reject certification of a case, the certification scheme ensures that the supreme court accepts only those cases that are appropriate for its review. If the supreme court deems a case unworthy of certification, it simply returns the case to the court of appeals with no prejudice to the litigants. [\[FN75\]](#)

As noted previously, certification of cases under ORS 19.405 is extremely rare. The court of appeals seems reluctant to certify cases to the supreme court, with some judges citing the importance of sharpening the issues and providing a well-reasoned work product for the supreme court to review. [\[FN76\]](#) The supreme court appears equally reluctant to accept certification in many instances. Unfortunately, providing an intermediate decision in almost all cases comes with a price. In three of the four cases discussed in Part III.B, the litigants would have received final dispositions on average two years earlier had the case proceeded directly to the supreme court. These delays are particularly problematic in cases where a plaintiff is severely injured and in need of compensation for his or her injuries. For example, in the Smothers case, the injured plaintiff was forced to wait an additional two years for the court of appeals to render a decision in a case that was likely headed for a final resolution in the supreme court. More importantly, the lack of certification in cases of statewide significance also delays final pronouncements from the supreme court on unsettled areas of the law. We concur in the assessment of one Portland litigator, who stated: "I am frustrated by the inattention to the statute that gives the [s]upreme [c]ourt the ability to bypass the [c]ourt of [a]ppeals and take important ***494** cases directly. I believe the substantial delays in final outcome under the current two-step process [are] unfortunate in these cases." [\[FN77\]](#)

2. Modifying the Current Certification Procedure

A variation on the current certification procedure would permit the supreme court, either by majority vote or by action of the chief justice under his power as the head of the Oregon Judicial Department, [\[FN78\]](#) to assert jurisdiction over any case on appeal that concerns issues of statewide or constitutional significance. The benefits of such an approach are the same as the ones associated with the current certification procedure, namely, that speedy clarification of the law benefits the bench, bar, and litigants. Since the current procedure requires both the court of appeals and the supreme court to approve

certification, permitting the supreme court to unilaterally determine certification would most likely increase the number of cases bypassing the court of appeals.

Placing certification solely in the hands of the supreme court would undoubtedly speed the final disposition of some cases, but loosening the current requirements of ORS 19.405 raises several potential problems. First, allowing a single body or individual to control the fate of certification increases the likelihood that political considerations will enter the process. The justices of the supreme court could also find themselves mired in time-consuming disputes over whether a particular case should bypass the court of appeals. Finally, the effectiveness of any plan to increase the number of cases proceeding directly to the supreme court depends on a corresponding reduction in the court's current caseload. Increased use of the current certification procedure by both courts, as opposed to unilateral certification by the supreme court, would appear to be a more desirable approach.

C. Limiting Supreme Court Review in Certain Cases

Another possible solution to the existing delays and high costs in Oregon's appellate system is to limit supreme court review to ***495** certain cases. Oregon Supreme Court Justice Susan M. Leeson recently stated: "[The supreme] court is primarily a law announcing court. If someone asks us to review a case from the [c]ourt of [a]ppeals merely to correct an error, the [supreme court] is unlikely to take that case."⁷⁹ [\[FN79\]](#) Justice Leeson's comments suggest that review by the supreme court is highly unlikely in cases involving alleged errors in the application of statutory rules. But under the current system, the court must still expend valuable time and resources to consider petitions for review in such cases. The costs are also high to the litigant who prevails in the court of appeals in these types of cases. Despite the slim chance of review by the supreme court, the prevailing party in the court of appeals must incur the cost of responding to the petition for review and wait another year or more for a final disposition.

1. Creating Finality to Decisions of the Court of Appeals

Several proposals, similar in nature, would address these concerns and increase the efficiency of the existing appellate system. One option is for the legislature to make decisions of the court of appeals final in certain cases arising out of statutes, such as workers' compensation and domestic relations cases. An additional proposal would vest final jurisdiction over all statutory questions, regardless of type, in the court of appeals. The supreme court would still have final jurisdiction over any constitutional issues under either option. For example, if a litigant challenged the constitutionality of a domestic relations statute, a party aggrieved by a court of appeals decision could petition the supreme court for review.

Removing the supreme court from the realm of statutory interpretation in certain cases would undoubtedly speed final disposition and dramatically reduce the approximately 800 petitions for review received by the court each year. However, this approach would take from the supreme court a long-standing and important power of most state high courts, namely, the final interpretation of untested statutory provisions. [\[FN80\]](#) Another obvious ***496** problem with giving the court of appeals final jurisdiction over all or some statutory claims is the confusion that would result in cases containing both statutory and constitutional or common law issues. The following hypothetical case of an employee who suffers sexual harassment in the workplace illustrates this problem. The employee's case will likely consist of statutory and common law claims: a civil rights violation claim under ORS chapter 659 and common law claims for assault and battery. In such cases, either the issues would be split between

two different courts, or one of the two courts would be arbitrarily given final jurisdiction. Both of these options increase the likelihood of conflicting decisions, and could result in the inclusion of frivolous claims in order to obtain appellate review in a particular court.

2. A Caveat to Supreme Court Review

One interesting proposal, based in part on the current system, would place the issue of finality largely in the hands of the litigants. Under this approach, most cases, except those proceeding directly to the supreme court for review, would continue to be filed in the court of appeals. At the time of filing in the court of appeals, both parties would have the option of including a preliminary statement identifying issues that warrant consideration by the supreme court. If both parties decline to include such a statement, the court of appeals could still certify the case directly to the supreme court under ORS 19.405. In the event neither the parties nor the court of appeals requests a decision from the supreme court, the decision of the court of appeals would be final. Similarly, the decision of the court of appeals would also be final if the supreme court declined certification.

This proposal is attractive for several reasons. First, it would significantly reduce the delay and cost associated with the current two-step appellate system. A litigant would prepare a single brief and undergo a single oral argument, which would result in a considerable reduction of time and expense. Second, in contrast to reform proposals that would make court of appeals decisions final in all cases of a certain type, this system would appropriately retain the supreme court as the final authority on all questions of Oregon law. Third, imposition of this system could easily be achieved within the existing appellate framework, requiring a relatively low degree of legislative action. The only drawback of this approach is the possibility of an increase in the supreme court's workload, which would result if the number of requests for a supreme court decision exceeded the current number of petitions for review. Considering the number of petitions for review that the supreme court currently receives, this proposal would most likely result in an insubstantial additional burden on the supreme court. Furthermore, regardless of any increase in the workload of the supreme court, this proposal would undoubtedly reduce the overall burden on Oregon's appellate court system.

3. Limiting Petitions for Review Through Attorney Fees Awards

Imposing a sanction of attorney fees on litigants who unsuccessfully seek review in the supreme court is another way to reduce the current number of petitions for review. The basis for this approach is that litigants will think twice before unnecessarily prolonging appeals because of the possibility of paying the opposing party's attorney fees. Reducing the workload of the supreme court is certainly a desirable goal, but providing for attorney fees awards also has some serious side effects. Deterring petitions for review through attorney fees awards would likely chill the development of Oregon's common law. Litigants would be far less likely to pursue untested claims knowing that they might incur thousands of dollars in additional legal fees. Along these lines, such a system would strongly favor litigants with substantial resources who are able to assume the risks of a fees award. Awarding attorney fees in these cases also has the potential to decrease the stature of the supreme court, since review of court of appeals decisions would occur only when a litigant seeks review in the supreme court. Lastly, the supreme court might expend valuable time and resources in petty disputes over the reasonableness of petitions for attorney fees. In light of these concerns, reform of the current two-step structure, rather than punitive measures designed to discourage petitions for review, might be a fairer and more just solution.

4. Review of Tax Court Decisions

Appeals from judgments of the Oregon Tax Court presently bypass the court of appeals and proceed directly to the supreme court. The supreme court must render a final decision in these cases, and they are not subject to the petition process. In most ^{*498} years, tax cases account for less than fifteen of the court's written opinions. [\[FN81\]](#) However, as the supreme court authors only around 100 opinions each year, any modification of the supreme court's current role in appeals from the tax court could help reduce the court's overall workload.

Some suggest that the tax court, as a court with specialized and technical expertise, should be a court of last resort except for cases involving constitutional issues. However, since the tax court is essentially a trial court, its decisions, like those of the circuit courts, should be subject to at least one layer of nondiscretionary appellate review. The court of appeals, as opposed to the supreme court, appears to be the more appropriate place for initial review of tax appeals. With few exceptions, the court of appeals decides initial appeals in almost all civil cases. Moreover, the court of appeals has appellate jurisdiction in other cases of a specialized, technical nature, such as appeals from the Workers' Compensation Board and Land Use Board of Appeals. Therefore, for purposes of clarity and consistency, the court of appeals should possibly have initial jurisdiction over appeals from the tax court, with discretionary review by the supreme court only in cases involving issues of constitutional or statewide significance.

5. Attorney Discipline Proceedings

We share the view of most lawyers that the supreme court, as the body ultimately responsible for admitting attorneys to practice in Oregon, should retain its current role as the ultimate arbiter of attorney discipline. Although the number of attorney discipline cases is not overly burdensome, they often generate lengthy written opinions and involve time-consuming factual investigation and analysis. Any reduction in the number of attorney discipline opinions would therefore provide the court with additional time to decide important legal issues. To reduce the number of discipline cases that require a final disposition from the supreme court, the legislature should require mandatory mediation when the case is filed in the supreme court. Providing for mandatory mediation in discipline cases will not eliminate attorney discipline cases from the supreme court's docket, but such action will provide the court with additional time to expend in other areas.

^{*499} 6. Death Penalty Review

Given the gravity of the issue at stake, direct review of death sentences appropriately lies in the supreme court. Furthermore, death penalty cases, like tax appeals and attorney discipline cases, do not generate a significant number of supreme court opinions. But these cases typically involve dozens of assignments of error and constitutional issues, and therefore place a significant burden on the supreme court's overall workload. Currently, the supreme court automatically reviews death sentences regardless of the defendant's desire to appeal. One possibility for lessening the time spent by the court on death penalty cases is to eliminate "automatic" review. Under this approach, the supreme court would still directly review death sentences, but only if the defendant seeks appellate review. The obvious concern regarding elimination of automatic review is the possibility that defendants sentenced to death may not be properly informed of their right to direct review by the supreme court. A simple solution to this

dilemma is for the trial judge to conduct a hearing following issuance of a death sentence, where the judge informs the defendant of the appeal process and determines on the record whether the defendant is capable of deciding whether to appeal. If the judge determines that the defendant lacks the mental capacity required to make an informed decision regarding an appeal, the supreme court would automatically review the case.

D. Changes in the Court of Appeals

Thus far, the reforms suggested in this Essay have focused on reducing the delays and costs associated with review in the supreme court. For the vast majority of cases, however, the court of appeals is the first stop in Oregon's appellate court system. Any complete study of the system therefore must also examine whether any changes are warranted in the structure or procedures of the court of appeals.

1. Increasing the Number of Judges

Approximately 4,000 cases are filed annually in the court of appeals. The court, usually in three-judge panels, hears oral argument in all cases if requested by the parties, and must render a final decision in every case. [FN82] In light of the large number of filings, *500 the speed with which the ten judges of the court of appeals operate is remarkable. But these speedy dispositions may soon be a thing of the past if Oregon continues to grow at its present rate. The number of judges on the court of appeals has remained constant since 1977, yet Oregon's population has increased by approximately thirty percent since 1980. [FN83] If current trends continue, the population will swell to 4,350,000 by 2025, an increase of approximately twenty-seven percent. [FN84] The legislature should therefore evaluate whether increasing the number of judges will permit the court to continue its efficient ways. Many judges believe that an increase in the court's size will diminish collegiality. Others maintain that adding another panel to the court of appeals will yield inconsistent decisions and increase the number of cases referred to the full court for en banc dispositions. [FN85] These concerns are certainly valid, but the addition of one three-judge panel will most likely have a minor effect on collaborative decision-making and the number of en banc cases. Moreover, the resulting increase in productivity clearly outweighs any of the minor drawbacks associated with adding an additional panel to the court of appeals.

2. Review of Administrative Decisions

Each year, the court of appeals closes approximately 500 appeals from administrative agencies and other quasi-judicial bodies. [FN86] An additional option for reducing the court of appeals' workload is to remove these appeals from the court's jurisdiction. Proponents of this approach argue that agency review should not lie with a generalist appellate court, mainly because these cases are highly fact-specific and involve basic application of statutory schemes. However, a strong majority of the attorneys surveyed favored subjecting administrative decisions to at least one level *501 of judicial review. If the legislature decides that judicial review of certain agency determinations continues to be appropriate, then perhaps the court of appeals should be the court of last resort for administrative appeals. Any initial judicial review should probably remain with the court of appeals, as opposed to the circuit court, in order to promote uniformity and consistency in Oregon's body of administrative law.

3. Streamlining Post-Conviction Appeals

Consider the following hypothetical scenario. A criminal defendant is convicted after a trial in circuit court. The defendant appeals the conviction to the court of appeals, which affirms the trial court's judgment. Following the decision of the court of appeals, the defendant appeals a second time and petitions for review in the supreme court. The supreme court declines to review the case. After a trial and two bites of the appellate apple, including review by Oregon's highest court, most casual observers would conclude that the defendant's conviction was final. But an entirely separate round of appeals awaits the defendant in this case. The defendant may also seek relief in a separate post-conviction proceeding, usually by filing a petition in the circuit court located at the defendant's place of incarceration. Most defendants who seek post-conviction relief in this fashion allege that their trial attorneys failed to adequately defend them. These post-conviction proceedings then wind their way from the circuit court, to the court of appeals, and ultimately to the supreme court.

Streamlining these post-conviction appeals is another possibility for reducing the workload of Oregon's appellate courts. One option is to require defendants to file post-conviction appeals at the same time they file their initial appeals. This approach would protect the right of criminal defendants to pursue post-conviction relief, and at the same time eliminate an additional round of appeals stemming from the same case. Defendants would assert post-conviction claims at the same time they appealed their conviction, and the appellate courts would decide both issues in a single proceeding. Considering that post-conviction appeals presently account for over 200 filings each year in the court of appeals, and over 100 petitions for review in the supreme court, consolidation of these cases would result in a noticeable reduction ^{*502} of the appellate caseload. [\[FN87\]](#) Critics of this proposal will argue that consolidation hampers the ability of criminal defendants to bring post-conviction claims, since most criminal appeals must be filed within thirty days after entry of judgment. [\[FN88\]](#) A possible response to this concern is to increase the number of days in which a criminal defendant may file a notice of appeal. We conclude that the legislature should take steps to streamline duplicitious criminal appeals, and at the same time ensure that any reforms afford criminal defendants their full rights under the United States and Oregon Constitutions.

Conclusion

There is no simple or single solution to the challenges currently facing Oregon's appellate courts. Several reforms, all of which may be accomplished within the current system, will help alleviate the delays and high costs experienced by many litigants. First and foremost, the legislature should reconsider the supreme court's role in ballot title review. Elimination of initiative-related cases from the supreme court docket will permit the court to dispose of actual judicial controversies in a more speedy fashion. Short of completely removing these cases from the supreme court, the legislature and the court should also explore other options in this area, including the assignment of initiative-related suits to a panel of retired judges and mandatory arbitration. To increase efficiency and speed pronouncements in important areas of the law, the supreme court and the court of appeals should both make greater use of the current certification procedure. Other modifications, such as requiring mediation in attorney discipline cases and giving death penalty defendants the option of appealing directly to the supreme court, will also help lessen present burdens on the supreme court's time. The legislature should also carefully evaluate the merits and drawbacks of the various proposals aimed at reducing the number of petitions for review in the supreme court. To further promote efficiency and promptness in the decision-

making processes of both appellate courts, consideration should also be given to adding another panel to the court of appeals and streamlining post-conviction appeals. Lastly, in addition to considering modifications to the existing system, the legislature should also evaluate whether substantial ***503** changes in the jurisdiction, structure, and procedures of Oregon’s appellate courts are also warranted.

The time has clearly arrived for the legislature to take a serious look at Oregon’s appellate court system. Any changes to the current system should enhance judicial efficiency and decision-making, and at the same time reduce the lengthy amount of time and high costs associated with litigating in the appellate courts. The proposals suggested in this Essay are structured to accomplish these goals. Some of these proposals involve only minor changes to the existing system, while others would result in a complete overhaul of the appellate court structure. Regardless of the path chosen, the legislature should act now to ensure that Oregon’s appellate courts are able to dispense justice fairly and efficiently well into the twenty-first century.

***504** Appendix 1

OREGON APPELLATE COURT SYSTEM QUESTIONNAIRE

1. Should the Oregon legislature revise or eliminate the Oregon Supreme Court’s current role in (a) ballot title review and (b) attorney discipline cases?
2. Should the Oregon Tax Court be the “court of last resort” in cases arising under Oregon’s tax laws that do not raise federal or state constitutional questions?
3. Should the jurisdiction of the Oregon Court of Appeals encompass review of Land Use Board of Appeals (LUBA) decisions and Workers’ Compensation Board orders?
4. Should appeals in cases that raise unsettled constitutional issues and other issues of a statewide significance bypass the court of appeals and go directly to the supreme court? How might the legislature effect such a system?
5. Should the legislature take steps to alter the number of judges on the supreme court or court of appeals? If any modifications to the current system result in a greater workload for the supreme court, should the court hear cases in three-judge panels?
6. What modifications to Oregon’s current two-step appellate system, if any, do you favor? Why?

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[FN1]. The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857, at 27 (Charles Henry Carey ed., 1926) [hereinafter The Oregon Constitution and Proceedings].

[FN2]. Id. at 65. At the time of Oregon's statehood in 1859, voters elected Deady to the new state supreme court. Ralph James Mooney, The Deady Years: 1859-1893, in *The First Duty: A History of the U.S. District Court for Oregon* 63, 64 (Carolyn M. Buan ed., 1993). Deady declined the state court seat and instead accepted President James Buchanan's appointment as Oregon's first federal district judge. Id.

[FN3]. David Schuman, The Creation of the Oregon Constitution, 74 Or. L. Rev. 611, 619 (1995).

[FN4]. Id. at 623.

[FN5]. Id.

[FN6]. The Oregon Constitution and Proceedings, *supra* note 1, at 199.

[FN7]. Id. at 314.

[FN8]. Or. Const. art. VII, § 2 (amended 1910).

[FN9]. Id.

[FN10]. Id. § 3 (amended 1910).

[FN11]. Id. § 6 (amended 1910).

[FN12]. Id.

[FN13]. Id. § 10 (amended 1910).

[FN14]. Id.

[FN15]. Id. § 20 (amended 1910).

[FN16]. The Oregon Constitution and Proceedings, *supra* note 1, at 27.

[FN17]. Or. Const. art. VII, § 1.

[FN18]. Id.

[FN19]. Id. § 2.

[FN20]. Id. § 3 (amended 1974& 1996). For thoughtful and contrasting analyses of article VII, section 3, of the Oregon Constitution, adopted as part of the 1910 initiative, see Hall S. Lusk, *Forty-Five Years*

of Article VII, Section 3, Constitution of Oregon, 35 Or. L. Rev. 1 (1955), and Thomas H. Tongue, In Defense of Juries as Exclusive Judges of the Facts, 35 Or. L. Rev. 143 (1956).

[FN21]. Or. Const. art. VII, § 2.

[FN22]. Id.

[FN23]. In 1913, the legislature increased the number of supreme court justices from five to the current seven. Act of Feb. 25, 1913, ch. 167, § 1, 1913 Or. Laws 294, 294 (codified at Or. Rev. Stat. § 2.010 (2001)).

[FN24]. See Or. Const. art. VII, § 2.

[FN25]. Or. Rev. Stat. § 2.520 (2001).

[FN26]. Id. § 250.085.

[FN27]. Id. § 250.131.

[FN28]. Id. § 251.235.

[FN29]. Or. Const. art. IV, § 6.

[FN30]. Or. Rev. Stat. § 1.430 (2001).

[FN31]. Id. § 9.536.

[FN32]. Id. § 138.012.

[FN33]. Id. § 305.445. The Oregon Tax Court, created in 1961, has exclusive jurisdiction in cases arising under Oregon's tax laws. Act of May 24, 1961, ch. 533, § 12, 1961 Or. Laws 987, 990 (codified as amended at Or. Rev. Stat. § 305.410 (2001)).

[FN34]. Or. Rev. Stat. § 469.403 (2001).

[FN35]. Id. § 421.630.

[FN36]. Id. § 250.044(5).

[FN37]. Id. § 28.200.

[FN38]. Id. § 9.210-.250.

[FN39]. Thomas H. Tongue, Delays on Appeals to the Oregon Supreme Court, 36 Or. L. Rev. 253, 255-56 (1957).

[FN40]. *Id.* at 253.

[FN41]. See, e.g., S.B. 405, 49th Or. Legis. Ass’y (1957).

[FN42]. 1 Legislative Interim Comm. on Judicial Admin., Report 22-23 (1959).

[FN43]. *Id.* at 26-27.

[FN44]. H.B. 1195, 55th Or. Legis. Ass’y (1969).

[FN45]. *Id.*

[FN46]. Judge David Schuman, Remarks at the Oregon Law Institute’s Appellate Courts Seminar 7 (Apr. 13, 2001) (transcript on file with authors).

[FN47]. *Id.* at 7-8.

[FN48]. *Id.* at 8.

[FN49]. Act of May 19, 1969, ch. 198, 1969 Or. Laws 327.

[FN50]. Act of July 20, 1973, ch. 377, § 1, 1973 Or. Laws 752, 752 (codified as amended at Or. Rev. Stat. § 2.540(1) (2001)).

[FN51]. Act of July 18, 1977, ch. 451, § 1, 1977 Or. Laws 389, 389 (codified at Or. Rev. Stat. § 2.540(1) (2001)).

[FN52]. Act of May 25, 1977, ch. 158, § 2, 1977 Or. Laws 91, 92 (codified as amended at Or. Rev. Stat. § 2.516 (2001)).

[FN53]. Or. Rev. Stat. § 2.520 (2001).

[FN54]. Act of Aug. 5, 1981, ch. 550, § 2, 1981 Or. Laws 619, 619 (codified as amended at Or. Rev. Stat. § 19.405 (2001)).

[FN55]. The judicial statistics cited in this Essay were provided by the Appellate Court Records Section of the Oregon Judicial Department. Copies of the statistics are on file with the authors.

[FN56]. See *Leo v. Keisling*, 327 Or. 556, 964 P.2d 1023 (1998) (challenging method used by secretary of state to determine total number of valid signatures on initiative petition).

[FN57]. See *Tongue*, *supra* note 39, at 253, 255-56.

[FN58]. See, e.g., *infra* notes 61, 64, 66.

[FN59]. Or. St. B. Bull., Jan. 2002, at 45.

[FN60]. E-mail from Bruce L. Campbell, Miller Nash LLP, to Ky Fullerton (Jan. 4, 2002) (on file with authors); E-mail from James N. Westwood, Stoel Rives LLP, to Ky Fullerton (Jan. 4, 2002) (on file with authors).

[FN61]. Civil No. 9601-00689 (Cir. Ct. Multnomah County, Or., May 14, 1997), *aff'd*, 160 Or. App. 201, 985 P.2d 804 (1999), *aff'd*, 332 Or. 59, 23 P.3d 320 (2001).

[FN62]. Peter Farrell, Decision in SUV Case Supports Juries' Awards, *Oregonian*, Jan. 20, 2001, at C2.

[FN63]. Civil No. 98C-20424 (Cir. Ct. Marion County, Or., Aug. 13, 1999), *aff'd*, 164 Or. App. 543, 993 P.2d 822 (1999), review denied, 330 Or. 138, 6 P.3d 1098, stay denied by *Doe v. Oregon*, 530 U.S. 1228 (2000).

[FN64]. See Or. Rev. Stat. § 432.240 (2001).

[FN65]. Civil No. 9211-07901 (Cir. Ct. Multnomah County, Or., Mar. 30, 1994), *aff'd* in part, *rev'd* in part, 144 Or. App. 52, 925 P.2d 107 (1996), *aff'd* on other grounds, 329 Or. 62, 987 P.2d 463 (1999).

[FN66]. Act of July 17, 1987, ch. 774, § 6, 1987 Or. Laws 1570, 1571 (codified at Or. Rev. Stat. § 18.560(1) (2001)).

[FN67]. Civil No. 9505-02969 (Cir. Ct. Multnomah County, Or., Oct. 31, 1995), *aff'd*, 149 Or. App. 49, 941 P.2d 1065 (1997), *rev'd*, 332 Or. 83, 23 P.3d 333 (2001).

[FN68]. Rob Eure, Suits over Initiative Titles Swamp Oregon High Court, *Wall St. J.*, Aug. 2, 2000, at NW4.

[FN69]. *Id.*

[FN70]. See *supra* note 55.

[FN71]. Eure, *supra* note 68, at NW4.

[FN72]. The supreme court may hear cases in “departments” of not less than three and no more than five justices. Or. Rev. Stat. § 2.111(1)-(2) (2001).

[FN73]. Or. R. App. P. 10.10(1).

[FN74]. Or. R. App. P. 10.10(6).

[FN75]. The supreme court must issue an order accepting or denying a certification within twenty days after it receives the certification, except that it may extend by not more than twenty additional days the time for acceptance or denial. *Id.* If the supreme court fails to act within these time limits, the certification is deemed denied. *Id.* Thus, in a case where the supreme court denies certification, the litigants would at most be subject to a delay of forty days.

[FN76]. Judge Jack L. Landau, Remarks at the Oregon Law Institute’s Appellate Courts Seminar 57 (Apr. 13, 2001) (transcript on file with authors).

[FN77]. Questionnaire Response of Barnes H. Ellis, Stoel Rives LLP (Dec. 17, 2001) (on file with authors).

[FN78]. Or. Rev. Stat. § 1.002(1) (2001) (“The Chief Justice of the Supreme Court is the presiding judge of the court and the administrative head of the judicial department of government in this state.”).

[FN79]. Gina Binole, State Supreme Court Hosts School, Bus. J. (Portland, Or.), Apr. 9, 1999, at 16.

[FN80]. See, e.g., Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 317 Or. 606, 859 P.2d 1143 (1993) (describing methodology for interpretation of statutory provisions by courts).

[FN81]. See supra note 55.

[FN82]. The court of appeals does not issue a written opinion in every case it considers. In many cases, the court issues an “AWOP,” which is a simple statement affirming the judgment below without a written opinion. See Ashbel S. Green, Case Highlights Oregon Court of Appeals’ Silent Rulings, Oregonian, Oct. 7, 1999, at D4 (discussing origin and use of AWOPs).

[FN83]. Secretary of State, Oregon Blue Book 2001-2002, at 6 (2001).

[FN84]. U.S. Census Bureau, Projections of the Total Population of States: 1995 to 2025, available at <http://www.census.gov/population/projections/state/stpjpop.txt> (last visited Feb. 2, 2002).

[FN85]. A majority of the judges of the court of appeals, or the chief judge acting alone, may refer any case to the full court for a decision en banc. Or. Rev. Stat. § 2.570(5) (2001).

[FN86]. See supra note 55.

[FN87]. See id.

[FN88]. Or. Rev. Stat. § 138.071(1) (2001).